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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 499.

E. F. BARNES, J. C. CARSON, J. JELKS
and J. ROBERTSON,
Petitioners,

v.

THE CITY OF GADSDEN, ALABAMA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 268 F. 2d 593 and of the United States District Court for the Northern District of Alabama at

174 F. Supp. 64 (1958). The judgment of the Court of Appeals was entered on June 30, 1959. A timely petition for rehearing was denied on September 4, 1959. The petition for a writ of certiorari was filed on October 27, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether petitioners are entitled to an injunction and declaration of rights against the execution and putting into effect of certain urban redevelopment plans of the City of Gadsden, Alabama, on the ground that they foster enforced racial segregation, where both courts below found that no evidence had been presented that the redevelopment plans propose or contemplate racial discrimination.

STATEMENT OF THE CASE.

Petitioners (Negro citizens) sought a declaration of rights and injunction to restrain the City of Gadsden and its Housing Authority from proceeding with slum clearance and urban redevelopment plans on the ground that the two projects involved were designed to perpetuate a pattern of segregated communities and housing in the City of Gadsden. Petitioners alleged that the program would discriminate against Negroes. More specifically, it was alleged that (1) the purpose of the redevelopment plans is to eliminate a racially-mixed neighborhood and establish separate all-Negro and all-white neighborhoods and (2) the redevelopment plans are discriminatory and in violation of the due process and equal protection provision of the Fourteenth Amendment to the Federal Constitution and other rights secured to the petitioners under the provisions of Title 42, United States Code, Sections 1981 and 1982. The United States District Court held that the threat of immediate and irreparable damage had not been shown and denied the application for preliminary injunction. After hearing on the merits on the request for declaratory judgment and a permanent injunction, the District Court, on August 19, 1958, refused to grant the relief sought and entered judgment for the respondents. The District Court in its findings of fact, found that:

> "The City * * * has adopted no ordinance or resolution based upon a policy, custom and usages of initiating, encouraging, enforcing and perpetuating residential segregation of the Negro and white races within its corporate limits. The City has neither by resolution, ordinance, nor other official action adopted any plans intended to or that will have the effect of rezoning the Negro or white residential areas within its limits and restricting the areas which will be available to the plaintiffs and members of their class for

future residential purposes, nor has the City adopted any resolution, ordinance or zoning regulation restricting any area so as to make the same unavailable to the plaintiffs and members of their class for residential purposes. The only zoning ordinance of the City applicable to residences applies to all persons and is based on types of dwellings and not on types of occupants or ownership" (Record p. 279).

Further the Court found that:

"No evidence has been presented that the [Housing] Authority, or the City, has included in the plan for the redevelopment of the Birmingham Street Area that sales by private purchasers or private redevelopers will be restricted to white people only or that the plaintiffs and members of their class will not be permitted to purchase same solely because of race or color. There is no evidence that by any plan for redevelopment and sale only plaintiffs or members of their class will be permitted to own or occupy the lots in the North Fifth Street Area. The evidence likewise fails to reveal that the [Housing] Authority has any plan for sales of dwellings in the involved areas after redevelopment in contravention of the Anti-Racial Covenant * * *. As to each such contention, the evidence and its tendencies are to the contrary" (Record p. 280).

The Court concluded, inter alia, that the Housing "Authority is prohibited from imposing racially-discriminatory restrictions upon resale" of project land. The Court refused, as an alternative, to require the Housing Authority to grant prior rights of purchase in favor of former residents of the project area, stating that the law does not compel integration but only prohibits enforced segregation, citing **Cohen v. Public Housing Administration**, 257 F. 2d 73 (1958), **cert. denied** 358 U. S. 928 (1959). The Court

cited and relied upon the principle that the law presumes that public officials will properly discharge their duties and that the courts will not anticipate evasion or improper performance of such duties.

The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit in a brief opinion filed on June 30, 1959. Judge Rives wrote a separate opinion concurring in the affirmance of the judgment insofar as it denies an injunction but dissenting as to the declared rights of the parties. The dissenting judge expressed the view that (1) actual segregation is contemplated under the proposed urban redevelopment plans, (2) the contemplated actual segregation is to be governmentally enforced, and (3) a redeveloper may not legally discriminate between purchasers on the basis of race or color.

ARGUMENT.

I. Supreme Court's Reluctance to Grant Certiorari to Review Evidence and Specific Facts.

The petitioners seek a review in this Court of the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court based upon findings of fact and conclusions of law in favor of respondents on all issues. Where the decision of the Court of Appeals sought to be reviewed turns entirely upon an analysis of the particular facts involved, or upon construction of particular contracts or written instruments, a petition for certiorari ordinarily is denied as lacking "substantial grounds". The Court will usually not grant certiorari to review evidence and discuss specific facts. **Graver Manufacturing Co. v. Linde Co.**, 336 U. S. 271, 275 (1949), and cases cited therein; **General Talking Pictures Corporation v. Western Electric Co.**, 304 U. S. 175 (1938); **N. L. R. B. v. Waterman S. S. Co.**, 309 U. S. 206, 208 (1940), and **Southern Power Co. v. North Carolina Public Service Co.**, 263 U. S. 508 (1924).

II. Application of Two-Court Rule.

Findings of fact concurred in by two lower courts will be accepted by the United States Supreme Court unless exceptional error is shown. **Comstock v. Group of Investors**, 335 U. S. 211, 214 (1948); **Corn Products Co. v. Commissioner**, 350 U. S. 46, 51 (1955). This well-settled "two-court rule" operates as well upon consideration of petitions for certiorari. Here both courts below decided against petitioners on the question as to whether the two urban redevelopment plans required or contemplated racial segregation.

III. Action is Premature.

There is no real controversy. The petitioners' position is based solely on speculation that respondents some time in the future might not follow their obligations under the law. Petitioners merely prophesy they may be discriminated against although there is an absence of proof of threatened discrimination. They nevertheless seek to enjoin the carrying out of the urban redevelopment plans involved despite the serious injury the public may suffer from the stoppage of the slum clearance projects. The record must present a case or controversy appropriate for adjudication. **Longshoreman's Union v. Boyd,** 347 U. S. 222, 224 (1954); **Aetna Life Insurance v. Haworth,** 300 U. S. 227 (1937); **Florida Lime & Avocado Growers v. Jacobsen,** 169 F. Supp. 774 (N. D. Calif., 1958). Equity will not act merely because of apprehension and fear when irreparable injury will not occur except possibly and then in the remote future. **Donnelly Garment Co. v. Dubinsky,** 55 F. Supp. 587, 596 (W. D. Mo. 1944), **aff'd.** 154 F. 2d 38 (C. A. 8, 1946); **Worthington Pump Corp. v. Douds,** 97 F. Supp. 656, 661 (S. D. N. Y. 1951); Skelly v. Dockweiler, 75 F. Supp. 11 (S. D. Calif. 1947). Plainly these petitioners are seeking only an advisory opinion. This Court will not decide abstract, hypothetical or contingent questions; nor constitutional issues in advance of the necessity thereof or give advisory opinions. **Alabama State Federation of Labor et al., v. McAdory et al.,** 325 U. S. 450, 461 (1945). Moreover, equity will not restrain one from doing what he is not attempting and does not intend to do. **N. L. R. B. v. Express Publishing Co.,** 312 U. S. 426 (1941); **Blease et al. v. Safety Transit Co.,** 50 F. 2d 852, 856 (1931). Here there is no evidence that respondents are attempting to discriminate or threatening to discriminate against petitioners.

The District Court noted the distinction between private and State action with respect to the application of the con-

stitutional guarantee of equal protection of the law. The Court observed that if it were **assumed** that private redevelopers should restrict sales and occupancy along racial lines in the future such would not be "State action" in violation of constitutional restraints.

Since the findings of fact clearly establish that racial discrimination has not been committed or threatened the trial court's observation was not requisite to the disposition of the issues. The District Court noted that each of the two urban redevelopment plans involved in this case contains an anti-racial covenant specifying that none of the agreements or conveyances executed under the plan shall impose any racial restrictions. Nor did the Court find anything in the plans to require that the sales by private redevelopers will be restricted to white people only or that the Negroes will not be permitted to purchase property solely because of race or color.

CONCLUSION.

The decision below turns upon its own facts and there is no conflict of decision among lower courts which justify grant of certiorari. Furthermore, there is no important question of Federal law involved in the case so as to warrant review in this Court.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

W. B. Dortch

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Attorneys for Respondents.

Certificate of Service.

This is to certify that on the 17th day of November, 1959, I served a copy of the foregoing brief for the respondents in opposition to writ of certiorari upon Arthur Burns, Esq., attorney for petitioners, by personally serving a copy upon him at his office in the City of Gadsden, Alabama.

.....
Attorney for Respondents.